

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

TOD THELEN,

Plaintiff,

v.

JOANNE BARNHART,

Defendant.

No. C 04-02696 JSW

**ORDER GRANTING
DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT
AND DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

Now before the Court is the motion of Plaintiff Tod Thelen ("Thelen") for summary judgment and the cross-motion of the Commissioner of the Social Security Administration ("Commissioner") for summary judgment. Pursuant to Civil Local Rule 16-5, the motions have been submitted on the papers without oral argument. Having carefully reviewed the administrative record and considered the parties' papers and the relevant legal authority, the Court hereby DENIES Thelen's motion for summary judgment and GRANTS the Commissioner's cross-motion for summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Thelen brings this action pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3) to obtain judicial review of a final decision of the Commissioner denying his request for Social Security benefits and supplemental income. Thelen is a 42-year-old male with a high school diploma. (Certified Transcript of Record Proceedings "Tr." at 26, 146.) His past vocational experience includes hardwood floor installation, roofing, automotive quality control, and carpentry. (Tr. at 166-73.) He has not had substantial gainful employment since the date of his on-the-job injury,

1 July 6, 1999. (Tr. at 15.) Thelen claims he has a disability due to depression and back injuries,
2 including spondylolysis with spondylolisthesis, lumbar disc disease, pars defect, and bilateral
3 neuropathy. (Tr. at 140.) He alleges he is unable to stand or walk for long periods of time, has
4 difficulty completing simple tasks, and is unable to repeatedly lift, bend, or perform tasks with
5 his arms extended in front of his body. (Tr. at 43-45, 54-56.)

6 Thelen was admitted to Marin General Hospital on July 6, 1999, after he injured his back
7 while ducking and stepping over a wheelbarrow at work. (Tr. at 199.) He was diagnosed with a
8 musculoskeletal strain of the lower back. (*Id.*) He received Toradal and Morphine for pain but
9 was still unable to move off of the gurney. (*Id.*)

10 Between July 1999 and March 2001, Thelen was treated by Dr. Gemmer, who referred
11 him to several specialists to try to address his persistent back injuries. (Tr. at 206-14, 274, 277-
12 79.) Dr. Lieberman, a board certified neurological surgeon, reviewed a March 13, 2000 magnetic
13 resonance imaging ("MRI") scan report of Thelen's spine. Dr. Lieberman noted the report
14 identified multilevel degenerative disease and a possible spondylolysis at L5, that the L5-S1
15 disk was abnormal, and that there appeared to be foraminal stenosis at both L4-5 and L5-S1.
16 (Tr. at 250.)

17 Thelen showed no significant improvement, even after receiving three separate lumbar
18 epidural steroid injections on April 17, 2000, May 2, 2000, and June 6, 2000. (Tr. at 206-14,
19 274.) Subsequent x-rays in early 2001 revealed a question of unilateral spondylolysis on the
20 right at L5-S1, a right L5 pars interarticularis defect, a partial left L5 defect, and a partial defect
21 of the right first sacral lamina. (Tr. at 218-20, 223.) On March 15, 2001, Dr. Lieberman
22 performed a lumbar discogram and diagnosed Thelen with lumbar disc disease with low back
23 pain, noting that the pain seemed most intense at the L5-S1 level. (Tr. at 241-42.)

24 In a March 8, 2002 report, Dr. Lieberman later reclassified Thelen as "permanent and
25 stationary." (Tr. at 263-65.) Thelen's complaints remained unchanged, but were consistent
26 with a constant slight to moderate pain becoming occasionally moderate to severe. (Tr. at 264.)
27 Dr. Lieberman recommended vocational rehabilitation because Thelen was not able to return to
28

1 his usual work. (Tr. at 263-65.) The objective medical tests still showed 50% loss of motion of
2 the back and radiographic evidence of spondylolysis. (Tr. at 264.)

3 On April 1, 2002, Dr. Lieberman diagnosed Thelen with lumbar disc disease and
4 spondylolysis based on another MRI and radiographic evidence. (Tr. at 259.) Dr. Lieberman
5 reported that Thelen could not lift over ten pounds and could not bend repeatedly. (Tr. at 261.)
6 On September 25, 2002, Dr. Lieberman noted that nothing had changed since his April progress
7 report and that there was no evidence of a focal neurological deficit. (Tr. at 253-54.)

8 Dr. Wheeler, a board eligible neurologist, examined Thelen on January 18, 2003, and
9 diagnosed him with chronic low back pain. (Tr. at 290-94.) He noted that Thelen had a normal
10 gait, strength, sensation and range of motion. (Tr. at 293.) Dr. Wheeler also noted that Thelen
11 was going to a vocational school, and that he hoped to pass the test to obtain a license to become
12 a building inspector. (Tr. at 291.) Thelen reported daily activities of limited household chores,
13 such as washing dishes or cleaning, and spending time with his children. (*Id.*) Dr. Wheeler
14 assessed that Thelen could lift or carry forty pounds occasionally and twenty pounds frequently,
15 limited by exacerbation of his back pain. (Tr. at 293.) Dr. Wheeler indicated that Thelen could
16 occasionally perform postural maneuvers, such as bending, stooping or crouching, with the
17 same limitation. (*Id.*) Additionally, Thelen could be expected to stand and walk at least six
18 hours and sit without restriction during an eight-hour workday. (*Id.*) Thelen was taking
19 Remeron, Lodine, and Norco, and he had suffered from asthma and depression in the past. (*Id.*)

20 Earlier, on June 27, 2001, Dr. Levinson, Ph.D. evaluated Thelen's psychological status
21 to help determine his candidacy for a multi-disciplinary pain treatment program at Kentfield
22 Rehabilitation hospital. (Tr. at 363-66.) Thelen completed a battery of psychological tests,
23 indicating a severe level of depression. (Tr. at 365-66.) Thelen began pain management
24 psychotherapy with Dr. Levinson in preparation for the program through September, when
25 Golden Eagle Insurance Company declined to approve the treatment. (Tr. at 288-89, 366.)
26 During this psychotherapy, Thelen exhibited some difficulty with memory and concentration, as
27 well as some resistance to interacting with others. (Tr. at 287.)
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1 On February 20, 2003, the Social Security Administration referred Thelen to Dr. Auluck
2 for a one-time psychiatric evaluation. (Tr. at 307-11.) Dr. Auluck diagnosed Thelen with Major
3 Depression, recurrent 296.33 (severe without psychotic features) with his global assessment
4 functioning at 60. (Tr. at 309-10.) Thelen continued to report a dysphoric mood, insomnia, lack
5 of drive, low energy level and impaired concentration. (Tr. at 309.) Dr. Auluck characterized
6 Thelen's concentration as "patchy" with difficulty maintaining persistence and pace. (*Id.*) Dr.
7 Auluck also stated that Thelen's daily activities and social functioning were "clearly limited,"
8 but found that he was able to interact fairly well with co-workers, supervisors, and members of
9 the public. (*Id.*) He noted that Thelen's ability to maintain an eight hour workday or a forty
10 hour work week on a consistent basis was compromised. (Tr. at 309-10.)

11 On June 4, 2003 and June 11, 2003, state agency medical consultants assessed that
12 Thelen had the residual functioning capacity to do light work with occasional stooping or
13 crouching. (Tr. at 322-23.) Additionally they felt that his psychiatric impairment was non-
14 severe and that his main impairment was due to his physical, rather than mental, problems. (Tr.
15 at 323.) They concluded that Thelen's depression, while classified as "major," was not severe
16 enough to satisfy the criteria under the listed impairment § 12.04, Affect Disorders. (Tr. at 329-
17 33.) When asked what his daily activities were on June 10, 2003, Thelen stated the following:
18 walking one mile a day, doing the dishes, helping his five children with their homework and
19 occasionally taking them to the park or playing catch with them. (Tr. at 323.) It was also
20 reported that "DEA could hear his wife coaching him in the background." (*Id.*)

21 Thelen filed an application for Social Security Disability Insurance Benefits and Social
22 Supplemental Income on September 4, 2002, alleging he had disabilities beginning July 6, 1999.
23 (Tr. at 107-09, 334-36.) His initial and reconsideration applications were denied on the basis
24 that his condition was not severe enough to prevent him from working. (Tr. at 74-78, 81-85.)
25 Thelen timely filed a Request for Hearing on August 11, 2003. (Tr. at 86-87.) An administrative
26 law judge ("ALJ") conducted a hearing on November 6, 2003. (Tr. at 20.) Thelen and a
27 vocational expert, Malcolm Brezinsky, both testified at the hearing. (*Id.*)
28

1 The ALJ found that Thelen's alleged inability to work was not fully credible given his
2 own testimony about his daily activities and corroborating accounts found in his medical records
3 (Tr. at 18-19.) These daily activities included doing dishes, dressing and bathing himself, taking
4 walks, playing video games, and helping coach a little league baseball team for his children.
5 (Tr. at 17-18.) Additionally, Thelen testified that he could occasionally lift twenty pounds from
6 the table. (Tr. at 55.) The ALJ also relied on the testimony of the vocational expert, who stated
7 that an individual of Thelen's age, education, past relevant work, and functional limitations
8 could perform jobs as a cashier, an optical final assembler, or a semiconductor bonder. (Tr. at
9 18.) The vocational expert testified that someone with a mild impairment in attention and
10 concentration could perform these jobs, but that someone with a moderate impairment could not
11 perform any jobs offered in the national economy. (Tr. at 65.) The ALJ found that while
12 Thelen's lumbar disc disease with low back pain was a severe impairment, he could perform
13 modest sedentary work, including lifting twenty pound objects from tabletop height, with a
14 stand or sit option every thirty minutes. (Tr. at 18-19.) Therefore, the ALJ concluded that
15 Thelen was not disabled within the meaning of the Social Security Act and denied benefits and
16 supplemental security income. (Tr. at 19.)

17 Thelen then filed a request for review of the ALJ's unfavorable decision, which the
18 Appeals Council denied. (Tr. at 6-8.) Having exhausted his administrative remedies, Thelen
19 commenced this action for judicial review of the ALJ's decision.

20 ANALYSIS

21 A. Standard of Review of the ALJ's Decision to Deny Social Security Benefits

22 A federal district court may not disturb the ALJ's decision unless it is based on legal
23 error or the findings of fact are not supported by substantial evidence. 42 U.S.C. § 405(g);
24 *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998). "Substantial evidence means more than a
25 mere scintilla, but less than a preponderance; it is such relevant evidence as a reasonable mind
26 might accept as adequate to support a conclusion." *Andrews v. Shalala*, 53 F.3d 1035, 1039
27 (9th Cir. 1995). To determine whether substantial evidence exists, courts must look at the
28 record as a whole, considering both evidence that supports and undermines the ALJ's findings.

1 *Reddick*, 157 F.3d at 720. The ALJ's decision must be upheld if the evidence is susceptible to
2 more than one reasonable interpretation. *Id.* at 720-21.

3 **B. Legal Standard for Establishing a Prima Facie Case for Disability**

4 The ALJ follows a five-step sequential evaluation process to determine whether the
5 claimant is disabled. *Id.*; 20 C.F.R. § 416.920. First, the claimant must not be presently
6 engaged in substantial gainful employment. 20 C.F.R. § 416.920(b). Second, the claimant's
7 impairment must be "severe." 20 C.F.R. § 416.920(c). Third, when the claimant has an
8 impairment that meets the duration required and is listed in Appendix 1 (a list of impairments
9 which are presumed severe enough to preclude work located in subpart P of part 404 of 20
10 C.F.R. § 416.920), or is equal to a listed impairment, benefits are awarded without considering
11 the claimant's age, education, and work experience. 20 C.F.R. § 416.920(d). Fourth, if the
12 claimant's impairment does not meet or equal a listed impairment, the ALJ must assess all
13 relevant medical and other evidence in the claimant's case record and make findings to
14 determine the residual functional capacity of the claimant to do his or her past work. 20 C.F.R.
15 § 416.920(e). If the claimant is able to do his or her past work, payments are denied. *Id.*
16 Finally, if the claimant cannot perform his or her past work, the ALJ must then determine
17 whether they are able to do any other type of work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the
18 ALJ finds that the claimant is not disabled at any step along the way, the claimant is not
19 disabled and there is no need to continue subsequent steps of the analysis. 20 C.F.R. §
20 404.1520.

21 The claimant carries the initial burden of proving disability in steps one through four of
22 the analysis. *Burch v. Barnhart*, 400 F.3d 676, 679 (9th Cir. 2005). However, if the claimant
23 establishes that he or she is unable to continue with past work, the burden shifts to the ALJ in
24 step five to show that the claimant can perform other gainful work. *Id.* Here, after going
25 through the complete evaluation process, the ALJ denied Thelen's application for benefits at
26 step five, concluding that Thelen was limited to less than a full range of sedentary work, and
27 that a significant number of such jobs existed in the national economy. (Tr. at 18.)
28

C. Substantial Evidence Supports the ALJ's Determination That Thelen is Not Disabled

Thelen asserts that the ALJ erred in concluding that Thelen's physical and mental impairments did not meet or equal a listed impairment. Thelen alleges that his impairment in attention and concentration is "moderate" instead of "mild," and consequently that the vocational expert's testimony requires a finding that there were no jobs he could perform. Additionally, Thelen argues that the ALJ improperly discounted his claims of excessive pain. In response, the Commissioner asserts that the ALJ's finding that Thelen's impairments were not disabling is free of legal error and supported by substantial evidence. Specifically the Commissioner argues that Thelen failed to prove mental disability, that the vocational expert's testimony supports the ALJ's decision, and that the ALJ properly rejected Thelen's subjective complaints.

1. The ALJ did not err in concluding that Thelen's impairments did not meet or equal a listed impairment.

Thelen contends that he meets the requirements for degenerative disc disease, which is listed under Disorders of the Spine in § 1.04 of Appendix 1. 20 C.F.R. Pt. 404, subpart P, App. 1, § 1.04. He also argues that he meets the criterion for Affective Disorders in § 12.04 of Appendix 1. 20 C.F.R. Pt. 404, subpart P, App. 1, § 12.04. The list of impairments in Appendix 1 are presumed severe enough to preclude gainful work. 20 C.F.R. § 404.1520(d). However, the mere diagnosis of a listed impairment is not sufficient to sustain a finding of *per se* disability; it must also meet the findings shown in the listing. *Id.* at § 404.1525(d); *see also Key v. Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985). "An ALJ must evaluate the relevant evidence before concluding that a claimant's impairments do not meet or equal a listed impairment." *Lewis v. Apfel*, 236 F.3d 503, 512 (9th Cir. 2001). It is the ALJ's purview and responsibility to weigh conflicting evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998). Where there is conflicting evidence, the ALJ may conclude that the listing requirements were not met if those conclusions are based on substantial evidence. *See Lewis*, 236 F.3d at 513-14.

1 In *Key*, there was conflicting evidence concerning four different listed impairments in
2 Appendix 1. Only one of the four doctors on record, Dr. Hunter, made contradictory findings,
3 but he did perform a full neurological examination. *Id.* Dr. Hunter's findings precluded the
4 claimant from meeting at least one of the requirements of each listing. *Id.* For example,
5 Menier's disease requires findings of disturbances of balance, but Dr. Hunter found no evidence
6 of ataxia, a constitutional unsteadiness in the use of the arms and legs. *Id.* While three other
7 doctors diagnosed the claimant with Menier's disease, the ALJ weighed the conflicting evidence
8 in favor of Dr. Hunter's opinion to find that the claimant did not meet or equal the listed
9 impairment, and this decision was upheld as based on substantial evidence. *Id.*

10 Here, there is conflicting evidence about the severity of Thelen's physical impairments.
11 (Tr. at 225-62, 290-93.) Dr. Wheeler conducted a comprehensive orthopedic consultative
12 examination, and concluded that Thelen could be expected to stand or walk at least six hours,
13 and lift and carry twenty pounds limited by exacerbation of his back pain. (Tr. at 293.) A §
14 1.04 Spinal Disorder is a Musculoskeletal Disorder requiring a loss of function for at least
15 twelve months. 20 C.F.R. Pt. 404, subpart P, App. 1, § 1.00. Loss of function is defined as the
16 "inability to ambulate effectively" or the "inability to perform fine and gross movements
17 effectively" on a sustained basis. *Id.* To ambulate effectively, a claimant must be able to
18 maintain a "reasonable walking pace over a sufficient distance to sustain daily life activities,"
19 and to travel without assistance to a place of work or school. *Id.* To effectively perform fine
20 and gross movements, a claimant must be able to "use both upper arm extremities" to sustain
21 daily life activities like feeding and bathing oneself. *Id.* Thelen testified to, and/or reported to
22 consultative examiners, the ability to dress and bathe himself, to take walks, to ride the bus, to
23 go to school, to coach baseball and to play video games, etc. (Tr. at 18, 136-38, 149-59, 307-
24 11.) Therefore, the ALJ's decision, supported by Dr. Wheeler's findings and Thelen's
25 testimony about his daily activities, is based on substantial evidence.

26 Similarly, the ALJ determined that Thelen's affective disorder with depression imposed
27 no restriction on daily activities, no difficulties in social functioning, no difficulties in
28 concentration, persistence or pace, and no episodes of decompensation. (Tr. at 17.) At least two

of these limitations, at a marked level, are required findings for Affective Disorders. 20 C.F.R. Pt. 404, subpart P, App. 1, § 12.04. Despite Dr. Auluck's diagnosis of "Major Depression, recurrent," the state agency medical consultants specifically evaluated Thelen's alleged mental disability under the criteria for § 12.04. (Tr. at 309-10, 329-333.) However, the state agency consultants diagnosed Thelen with "Major Depression, stable" and rated his resulting degree of functional limitation as "mild." (Tr. at 330-31.) This assessment, in combination with Thelen's testimony about his daily activities, constitutes substantial evidence to support the ALJ's determination that Thelen's mental impairments, considered singly or in combination, did not equal or meet any impairments listed in Appendix 1.

2. Substantial evidence supports the ALJ's conclusion that Thelen could perform modest sedentary work.

Thelen insists that the medical evidence of his depression shows at least moderate impairment in attention and concentration, and that the ALJ lacked substantial evidence to conclude that Thelen had only a mild impairment. The vocational expert testified that someone with the same functional limitations as Thelen, plus a mild impairment in attention and concentration, could work, for example, as a cashier, but that someone with a moderate impairment could not perform any jobs offered in the national economy. (Tr. at 65.)

While a treating physician's opinion normally is afforded great weight in disability cases, that opinion is not necessarily conclusive as to the ultimate issue of disability. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989). "To reject the opinion of a treating physician [that] conflicts with that of an examining physician, the ALJ must make findings setting forth specific, legitimate reasons for doing so that are based on substantial evidence in the record." *Id.* (internal quotations omitted). To satisfy this burden, the ALJ must set out a "detailed and thorough summary of the facts and conflicting clinical evidence, [state] his or her interpretation thereof, and [make] findings." *Cotton v. Bowen*, 799 F.2d 1403, 1408 (9th Cir. 1986).

There is conflicting evidence of the severity of Thelen's mental impairment. In 2001, Dr. Levinson indicated that Thelen exhibited "some difficulty" with memory and concentration.

(Tr. at 287.) In 2003, Dr. Auluck, in a one-time consultative assessment, found that Thelen would have difficulties in maintaining persistence. (Tr. at 309.) However, the ALJ specifically stated that Dr. Auluck's assessment "did not give adequate consideration to the claimant's activities which indicate his concentration, persistence, or pace is not impaired." (Tr. at 17.) Dr. Auluck listed Thelen's activities as dressing and bathing himself, with occasional assistance. (Tr. at 309.) The ALJ gave more weight to the opinions of the state agency medical consultants in light of Thelen's otherwise consistently reported daily activities. (Tr. at 17.) After reviewing Thelen's files and some follow-up investigation, the state consultants reported that Thelen's psychiatric condition was "currently non-severe." (Tr. at 323.) When asked, Thelen reported that his daily activities included walking one mile, doing the dishes and helping the kids with their homework. (Tr. at 323.) These daily activities were also reported to Dr. Wheeler. (Tr. at 291.) To further support his finding that Thelen's concentration was not severely impaired, the ALJ also pointed to Thelen's consistent testimony about his activities, such as playing video games, and coaching children's baseball. (Tr. at 17.) Therefore, substantial evidence supports the ALJ's determination that Thelen had a mild, instead of moderate, impairment in attention and concentration.

3. **The ALJ properly considered the objective medical evidence and Thelen's subjective complaints of excessive pain.**

Thelen claims that the ALJ improperly disregarded his testimony regarding his severe pain. This Court must give great weight to the ALJ's credibility determinations. *Fair v. Bowen*, 885 F.2d 597, 602, 604 (9th Cir. 1989). However, the Ninth Circuit recognized that the degree of pain is a purely subjective phenomenon. *Id.* at 601. Therefore, once a claimant submits objective medical evidence establishing an impairment that "could reasonably be expected to cause some pain, it is improper as a matter of law for an ALJ to discredit excess pain testimony solely on the ground that it is not fully corroborated by objective medical findings." *Id.* If the ALJ does discredit the severity of the pain, he or she is required to set forth "specific findings justifying that decision." *Id.* at 602. Where those specific findings are supported by substantial evidence, the decision should not be second-guessed. *Id.* at 604.

1 In *Fair*, the ALJ set forth the requisite specific findings to justify his rejection of the
2 claimant's excessive pain testimony. *Id.* at 604. The ALJ found that the claimant received
3 minimal conservative treatment for his complaints, he failed to follow his doctor's advice
4 regarding exercise and weight reduction, and he remained capable of caring for himself and his
5 home. *Id.* For example, the claimant was able to care for his personal needs, perform his own
6 household and shopping chores, ride public transportation and drive his own car. *Id.* Despite
7 claimant's testimony that his pain was prohibitive, this type of evidence justified the ALJ's
8 determination that the claimant was not precluded from working. *Id.*

9 Like the claimant's daily activities relied upon in *Fair*, the ALJ's decision to reject
10 Thelen's subjective pain complaints was based on his own contradictory testimony about his
11 ability to walk to the store, occasionally lift up to twenty pounds of groceries from the table,
12 play video games, and coach children's baseball. (Tr. at 17.) The ALJ also noted that Thelen
13 had reported similar activities to several consultative examiners, including doing dishes,
14 cleaning, and dressing and bathing himself. (Tr. at 18.) These specific findings are supported
15 by substantial evidence that justify the ALJ's credibility determination.

16 The Court thus finds that the ALJ's finding that Thelen's impairments did not equal or
17 meet a listed impairment is supported by Dr. Wheeler's report, the state agency medical
18 consultants' report, and Thelen's testimony. The ALJ's balancing of conflicting evidence
19 concerning the severity of Thelen's mental impairments in attention and concentration is
20 similarly based on objective medical records and hearing testimony. Additionally the ALJ
21 provided sufficient findings supported by the record as a whole to justify his decision to
22 discredit Thelen's subjective pain testimony. The ALJ's decision is therefore supported by
23 substantial evidence and is free of legal error. Although Thelen's motion points to other
24 possible interpretations, it is not the job of this court to reevaluate the evidence.

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CONCLUSION

For the foregoing reasons, this Court hereby DENIES Thelen's motion for summary judgment and GRANTS the Commissioner's cross-motion for summary judgment.

IT IS SO ORDERED.

Dated: August 15, 2005



JEFFREY S. WHITE
UNITED STATES DISTRICT JUDGE

United States District Court

For the Northern District of California